FIRST AMENDMENT NEIGHBORS

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INTRODUCTION

Constitutional provisions are only as good as the company they keep. The First Amendment, for example, contains a pair of textual neighbors—the Expression Clauses and the Religion Clauses. Within each set of clauses, moreover, reside two distinct provisions. While not perfect likenesses, of course, both the Religion Clauses and the Expression Clauses are two-headed creatures that further a sometimes harmonious and sometimes conflicting set of goals. They both arise out of significant historical backgrounds, and rely on the interpretation of key terms that embody multiple meanings.

Despite these similarities, the Supreme Court has found a way to chart a route through the Religion Clauses that seems to elude it when it comes to the Expression Clauses.[1] In the religion context, the Court has found

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1. *See* Zoë Robinson, *What Is a "Religious Institution"?*, 55 B.C. L. REV. 181, 189 (2014) (observing that "where-as the Press Clause has remained dormant, lower federal courts have been actively employing the religious institution category, making it unlikely that the Court will abruptly

meaning in and an active role for both the Free Exercise and Establishment Clauses, famously noting that there needs to be "play in the joints" between the two.[2] In dealing with the Religion Clauses, the Court has wisely recognized that the two clauses must peacefully coexist; that the meaning given one clause inevitably affects the other; and that that reality must play a role in how the Court interprets and applies the two provisions.

With the Expression Clauses, however, the Court's approach has been very different.[3] One of the two provisions, speech, has received all of the Court's attention while the other, press, has been all but ignored. While developing a robust Speech Clause jurisprudence, the Supreme Court has never recognized any constitutional rights or protections based solely in the Press Clause.[4] It has chosen, instead, to decide cases with press issues under a vague amalgamation of First Amendment rights that apply broadly to all speakers. These so-called "press" cases, for example, include *New York Times v. Sullivan*,[5] which protects all speakers from liability without actual malice when they speak about public conduct of public officials as a speech and press right, and *Richmond Newspapers, Inc. v. Virginia*,[6] which gives everyone, not just the press, the right of access to criminal proceedings based on combination of speech, press and assembly rights.

As I have written about elsewhere, this failure of the Court to see the Press Clause as independent from the Speech Clause has prevented it from considering other potential rights and protections that could help press speakers fulfill their unique constitutional functions.[7] Because the Speech Clause robustly protects speech and publication, the Press Clause could play a role in newsgathering. Press speakers, for example, could have constitutional rights of access to government information, meetings, and places. The Press Clause could provide members of the press with protection from liability for minor torts committed during the

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reverse gears and disengage from defining the rights holder because of the exclusive nature of the right").

2. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)) (internal quotation marks omitted).

3. *See* Robinson, *supra* note 1, at 189 (observing that "the Court [has] avoid[ed] addressing who or what is 'the press' for First Amendment purposes," but has been "willing[] to imply a categorical protection from the Religion Clauses").

4. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983) ("Thus far the Supreme Court has declined to give independent significance to the phrase 'freedom of the press.' It has refused to give the press any more protection than an individual enjoys under the speech clause."); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) (stating that the Court "steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause").

5. 376 U.S. 254 (1964).

6. 448 U.S. 555 (1980).

7. *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. (forthcoming 2014) (advancing the principle of press exceptionalism and recognizing the unique functions of the press in our democracy).

newsgathering process like trespass, fraud, and breach of duty of loyalty—all common tools used during undercover reporting. An active Press Clause could give constitutional protections to press speakers who are served with government subpoenas and search warrants seeking information about their sources, newsrooms, and work product including potentially a constitutional testimonial privilege to protect confidential sources.

This Essay thus asks whether there is anything to learn from the Court's treatment of the Religion Clauses, where it has not found it necessary to deny one of the clauses its potential power, when considering the Expression Clauses. It does so by examining the similarities and differences between the two sets of clauses. Ultimately, this inquiry leads to the conclusion that the differences between the two do not support the opposing approaches by the Court. In fact, giving a meaningful role to the Press Clause is potentially an even less-fraught task than is the challenge of finding "play in the joints" of the Religion Clauses. Considering the underlying values of the two sets of clauses emphasizes the need for a more active Press Clause.

I. COMMON ISSUES

Both the Religion and Expression Clauses involve an underlying balancing act. On the one side are personal rights that strike at the core of autonomy and self-realization. On the other are important government interests in effective regulation and the need to protect others from harm.

With expression, for example, there are individual autonomy and democracy-enhancing reasons to recognize expansive speech and press rights. These benefits, however, must be weighed against the countervailing harms inherent in issues like defamation, privacy, national security, indecency, and fair trials. Protection of religious freedoms likewise pits matters of personal conscience against societal needs to regulate issues of discrimination based on gender, race, sexual orientation or disability,[8] health and welfare,[9] employee benefits,[10] and so on.

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8. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 709 & n.4 (2012) (holding that the ministerial exception, which is grounded in the Religion Clauses, provides an affirmative defense to Americans with Disabilities Act claims).

9. *See, e.g.*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 89 (E.D.N.Y. 1987) ("[Religious exemption to state vaccination law] seems to be designed specifically to advance the interests of individuals who oppose vaccination on theological grounds. Such treatment of religious interests can justifiably be seen as a reasonable accommodation of the considerations more directly addressed by the free exercise clause of the First Amendment.").

10. *See* Korte v. Sebelius, 735 F.3d 654, 687 (7th Cir. 2013) (holding that the Affordable Care Act's contraception mandate imposes a substantial burden on the plaintiff corporations' rights to the free exercise of religion).

In both cases, moreover, there is a general interest in uniformity of law that makes it problematic to have too many exceptions to generally applicable laws. This potential conflict between these competing values underlies the debates in both situations.

What we see in both the Religion Clauses and the Expression Clauses, therefore, is that within each there is an idealized pull toward overly inclusive protections with one provision (Speech and Free Exercise) yet tangible benefits of a more narrow set of rights with the other (Press[11] and Establishment). These opposing forces manifest themselves in concerns that constitutional protections can be both under- and over-inclusive. In both cases, this issue is evident more specifically in discussions on how to define key terms—"religion" and "press."

A. Concerns of Under-Inclusive Protection

With both sets of clauses there is a fear that an overly narrow definition will exclude those outside of the mainstream. With religion, the concern is that religious beliefs that do not fit into a traditional organized religious mold will not be protected. Attempting to avoid this problem in matters of "religion," therefore, the Court has stated that not all religions are organized or theistic despite the prominence of such religious beliefs in the United States.[12]

Similarly, when thinking about defining the press, there is also a concern of under-inclusivity. With the press, this issue is often discussed as a problem of elitism.[13] The concern is that a definition of the press will favor established media outlets while leaving the voices of minorities and the oppressed unheard.[14] Thus, fears of giving certain groups a special constitutional status haunt both terms. There is a common instinct, moreover, to err on the side of constitutional overprotection—the more religious or expressive freedom the better.

In a nonconstitutional context, the Court has addressed the under-inclusivity problem of determining what is a "religion" by telling us that

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11. *See* West, *supra* note 4, at 1056–70 (explaining how "a narrower definition of the press can be both constitutionally acceptable and functionally superior"); West, *supra* note 7 (proposing that we look to constitutional roles of the press to narrowly define the press).

12. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 189 (1965) (Douglas, J., concurring) ("The words 'a Supreme Being' have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms."); *cf.* McCreary Cnty. v. A.C.L.U., 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) ("The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic.").

13. *See generally* West, *supra* note 7 (addressing charges that press exceptionalism is a form of elitism).

14. *See generally id.*

"religion" can include philosophical or moral beliefs.[15] In that case, *United States v. Seeger*,[16] the Court considered a claim of conscientious objector status for the military. The statute allowed an exception for those who, based on "religious training and belief," objected to participation in combat or war.[17] The petitioner said he did not necessarily believe in God, but he believed in a devotion of goodness and virtue for its own sake.[18] He said he based this belief on the teaching of philosophers like Aristotle and Plato.[19] The Court accepted this, and said the question should be whether "the claimed belief occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."[20]

Otherwise, the Court has refused to be in the business of deciding whether a personal belief is or is not a religion. In *United States v. Ballard*,[21] moreover, the Court said that courts cannot be in the business of judging the truth of someone's beliefs, explaining that "[h]eresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[22]

In the speech context, it is also a commonly shared belief that we should err on the side of more First Amendment protections in order to prevent government tyranny and to protect individual autonomy.[23] This is most evident with the appeal of free speech absolutism.

Similarly, there are many scholars and judges who have taken the stance that if we were to define the "press" it would need to include all or practically all speakers.[24] As I have explained in a different article, however, too broad of a definition of the press can lead to excessive

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15. *Seeger*, 380 U.S. at 189 (Douglas, J., concurring) ("The words 'a Supreme Being' have no narrow technical meaning in the field of religion. Long before the birth of our Judeo-Christian civilization the idea of God had taken hold in many forms.").

16. 380 U.S. 163 (1965).

17. *Id*. at 165 (quoting the Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (2012)) (internal quotation marks omitted).

18. *Id*. at 166.

19. *Id*.

20. *Id*. at 184.

21. 322 U.S. 78 (1944).

22. *Id*. at 86.

23. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663–64 (1994) (internal quotation marks omitted) ("Likewise, assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) ("We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions."); Roth v. United States, 354 U.S. U.S. 476, 488 (1957) ("Ceaseless vigilance is the watchword to prevent [an] erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.")

24. *See* West, *supra* note 4, at 1030 n.32.

overlap with the Speech Clause and ultimately (and somewhat ironically) to fewer tailored Press Clause rights.[25] The problem is that in order for the Press Clause to mean something different from the Speech Clause, there needs to be sufficient separation between the two. In other words, the Press Clause can not apply to everyone. Every individual cannot be a journalist, and every message cannot also be news. If there is too much overlap, there is no need for two distinct clauses. Thus, an overly broad view of the press means that in situations where it is undesirable to give everyone press rights and privileges, the only choice becomes that no one gets these protections.[26]

B. Concerns of Over-Inclusive Protection

While there are reasons to be concerned about limiting religious or expressive freedoms, there are, at the same time, limits to how broadly either "religion" or "press" can be defined and still be effective. Both terms raise risks that being too all encompassing can make the terms, and thus the constitutional provisions or legal rules relating to them, so broad as to be either paralyzing or meaningless. Overly broad definitions create opportunities for pretextual claims of constitutional rights and protections as well as interfering with needs for uniformity in applying laws.

An overly broad definition of either "religion" or "press" creates the risk that they will be used pretextually. An individual might, for example, declare that his religion dictates that he use illegal drugs in order to avoid criminal charges. A speaker, meanwhile, could claim to be a member of the press as a way to get out of testifying in a judicial proceeding.[27]

This was an issue in the religious context in a case involving prisoners who declared themselves members of the "Church of the New Song." They claimed First Amendment protection for various acts that were designed "to cause or encourage disruption of established prison discipline," such as "a tongue-in-cheek request for prison authorities to supply steak and wine."[28] The district court in this case, after concluding that it could examine the sincerity of the prisoners' beliefs, concluded that the religion

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25. *See id.* at 1056–58.

26. *See generally* Houchins v. KQED, Inc. 438 U.S. 1 (1978) (refusing to recognize a "right of access" under the First Amendment to interview particular prisoners); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (holding that the Federal Bureau of Prisons' prohibition on personal interviews of designated inmates did not violate the First Amendment); Pell v. Procunier, 417 U.S. 817 (1974) (holding that a rule prohibiting journalists from interviewing particular inmates and forbidding inmates from initiating interviews did not violate the First Amendment).

27. *See* Too Much Media, LLC v. Hale, 20 A.3d 364 (N.J. 2011) (interpreting a state reporter's shield law to not include speakers who post comments on internet message boards.)

28. *See* Theriault v. Silber, 453 F. Supp. 254, 260 (W.D. Tex. 1978).

> appears not to be a religion, but rather as a masquerade designed to obtain First Amendment protection for acts which otherwise would be unlawful and/or reasonably disallowed by the various prison authorities but for the attempts which have been and are being made to classify them as "religious" and, therefore, presumably protected by the First Amendment.[29]

If taken to extremes, pretextual uses of religion can potentially interfere with regulations that rely on general application in order to be effective. An issue of current debate, for example, involves parents who claim a religious exemption not to vaccinate their children even in cases when their objections are not sincerely religious.[30] The problem, of course, is that if too many parents refuse to inoculate their children, dangerous diseases will spread.

Even when claims of "religion" are not pretextual but are sincerely held, moreover, an expansive definition risks interfering with the ability of the government to regulate effectively. This was the primary concern of Justice Scalia in *Employment Division v. Smith*,[31] which involved two Native Americans who claimed that peyote use was part of their religious practices.[32] While not doubting the sincerity of the belief, the Court concluded that such a broad reading of the Free Exercise Clause would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[33]

The Court expressed the same concern about an overly broad view of "the press" in the context of the reporter's privilege. In *Branzburg v. Hayes*, Chief Justice Burger argued that effective law enforcement would be compromised if too many people could claim a reporter's privilege and not have to cooperate with a grand jury subpoena.[34]

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29. *Id*.

30. *Compare* Editorial, *Vaccine Opt-Outs Put Public Health at Risk: Our View*, USA TODAY (Apr. 13, 2014, 9:08 PM), http://www.usatoday.com/story/opinion/2014/04/13/vaccines-measles-misinformation-risks-editorials-debates/7682093/ (contending that state laws make it "too easy" to opt-out of mandatory vaccines by claiming a "philosophical exemption" and that the parents should only be able to opt-out for "strictly defined medical or religious reasons"), *with* Barbara Loe Fisher, Op-Ed., *Leave Parents Free to Choose Vaccines: Opposing View*, USA TODAY (Apr. 13, 2014 9:14 PM), http://www.usatoday.com/story/opinion/2014/04/13/vaccine-safety-choice-parenting-editorials-debate/7682095/ ("Non-medical vaccine exemptions immunize individuals and the community against unsafe, ineffective vaccines and tyranny.").

31. Emp't Div. v. Smith, 494 U.S. 872 (1990).

32. *Id*. at 874.

33. *Id*. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)) (internal quotation marks omitted).

34. Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972) ("We perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting

Thus, with both the Religion Clauses and the Expression Clauses, there is a pull toward an overly inclusive definition with one provision yet benefits of a more narrow definition with the other. They both require the courts to consider the unique roles of the separate provisions but also keep in mind the bigger picture. The Court has recognized this challenge explicitly in the religion context, noting that "'there is room for play in the joints' between the Clauses" but that the Court must "find a neutral course between the two Religion Clauses."[35] Each pair of clauses involves two interacting parts. The treatment of one clause sheds light on the other.

II. EXPRESSION CLAUSES ARE EASIER

Both the Religion and the Expression Clauses present the problem of walking the line between an all-encompassing or too narrow definition. The Court has managed to strike a balance that gives both of the Religion Clauses a practical role to play. The question, then, is whether there is a similar approach that could be applied to the Expression Clauses. This section contends that there is. For three reasons, moreover, handling the tug and pull of the Speech and Press Clauses is likely an even more workable task than maneuvering through the Religion Clauses.

A. Two Distinct Terms

In the search for light between the Free Exercise Clause and the Establishment Clause, there is a challenge that is absent with the Expression Clauses—both Religion Clauses refer to the same term "religion" whereas the Speech and Press Clauses involve two distinct terms. The problem this presents is that a broad definition of "religion" meant to grant expansive free expression rights could potentially curb the ability of the government to regulate effectively without encountering Establishment Clause limitations.[36] The Court has noticed this quandary, stating that the clauses "tend to clash" between a desirably narrow interpretation at times and a broad view in other circumstances.[37]

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that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.").

35. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970)).

36. *Id*. *But see* Carl H. Esbeck, *"Play in the Joints Between the Religion Clauses" and Other Supreme Court Catachreses*, 34 HOFSTRA L. REV. 1331, 1333–36 (2006) (arguing that the clauses do not conflict).

37. *See Walz*, 397 U.S. at 668–69 ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

A recent case in California highlighted this dilemma. A court was charged with determining whether yoga was a "religion"[38] for First Amendment purposes. Yoga, as the court noted, "has been associated with Eastern religions, specifically Hinduism, Buddhism, and Jainism," which in some forms has a purpose "to attain human salvation and a release from human suffering and the cycle of Indian rebirths and to ultimately spend eternity with a universal power, or the divine."[39] An issue arose, however, when a community foundation began teaching yoga in local public schools.[40] This case highlights the friction between the Religion Clauses—does declaring the spiritual role of yoga as "religious" for Free Exercise Clause purposes place too many Establishment Clause limitations on the government, such as the ability of a public school to teach yoga for "the physical postures, breathing, and relaxation" as part of its physical education curriculum?[41]

The Expression Clauses, however, present no such obstacle. "Speech" and "press" are two different terms that can and should embrace two different meanings. The clauses, moreover, in no way conflict. They might overlap and certainly can reinforce each other, but the Court is free of the concern that the definition of one term might inadvertently warp the meaning of the other.

B. Fallback Protections

Neither the Religion nor the Expression Clauses exist in a vacuum. All constitutional provisions are, of course, but a cog in our multifaceted legal system. These other constitutional elements can affect how these sets of clauses function and, in turn, how best to protect the underlying interests.

1. Speech Clause

The relationship between the Speech and Press Clauses is unique. Unlike the potentially zero sum game of the Religion Clauses—where expanding rights in one context can lead to restriction in the other—the Speech and Press Clauses work together. The Speech Clause, in other words, provides a fallback protection that makes defining the press more feasible than defining religion because line-drawing perfection is not necessary.

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38. Sedlock v. Baird, No. 37-2013-00035910 (Cal. Super. Ct. Sept. 23, 2013).

39. *Id.*, slip op. at 2.

40. *Id.*, slip op. at 8–9.

41. *Id.*, slip op. at 4; *see also id.*, slip op. at 14 (concluding that while yoga has a religious component to it, the schools were not teaching that aspect in their health and wellness programs).

The Court's speech jurisprudence is one of constitutional overprotection. In the speech context, the costs of line-drawing errors are high and present a risk that a speaker or message will be lost to our public debate. Censorship can be difficult or impossible to reverse. These powerful speech rights mean, however, that press protections can be doled out on a more discerning basis.[42] Because declaring a speaker not to be a press speaker does not leave that speaker out of our public debate, there is less pressure on the Press Clause side of the equation. All speakers have robust speech rights that allow these voices to be heard and often to function in press-like ways. Strong speech protections also leave open channels for a wrongly excluded speaker to make his or her case for press status. Speech protections against content-based discrimination, including viewpoint- and speaker-based discrimination, offer further protection. The relationship between the Speech and Press Clauses creates a structural benefit that is unique and allows for constitutional overprotection of speech rights and a more discerning approach to press protections. Nonpress speakers remain free to express themselves, including by publishing and disseminating their messages. Error costs, therefore, are much lower.

The fallback protections of the Speech Clause also address concerns of elitism. Thanks to advances in communication technology, it is becoming increasingly easier for nonmainstream speakers to function as the press by making it cheaper and more accessible for everyone to regularly communicate information about matters of public concern to a broad and established audience. This allows more speakers to attain press status, and if not deemed to be the press, allows them to exercise their strong speech rights. Courts, therefore, should go forward with confidence that even an imperfect realization of press rights will have the effect of increasing the overall universe of expressive freedoms.

Unlike the Speech and Press Clauses, which support the same structural goals, the Free Exercise and Establishment Clauses are frequently at odds with one another, making finding the appropriate balance of religious freedoms more difficult. Perhaps because of this conflict, the Speech Clause also has become a fallback protection for religious freedoms. In a series of cases,[43] the Rehnquist Court relied on the

42. West, *supra* note 4, at 1058 ("[O]ur broad free speech rights for everyone justify a narrow rights regime for the press.").

43. *See* Widmar v. Vincent, 454 U.S. 263, 267-77 (1981); Bd. of Educ. v. Mergens, 496 U.S. 226, 253 (1990); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-95 (1993); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830–46 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001).

free speech principle of content neutrality to protect religious expression.[44] According to Professor Mark Cordes, this argument that religious speech must be treated equally to other types of speech has became a powerful defense again Establishment Clause claims, "creating a nice symmetry between the two clauses in regard to religious speech."[45] Shifting the power center from the Free Exercise Clause to the Speech Clause "has prompted some concern that if worship is viewed purely a type of speech, its claim to special protection under the establishment and free exercise clauses may be diluted."[46] But it has, nonetheless, taken some pressure off of reliance on the Free Exercise Clause to fully protect religious freedoms without clashing with Establishment Clause concerns.

Thus both the Press Clause and the Free Exercise Clause can rely on the Speech Clause as an important backup provision. But it provides support for each clause in different ways. In the religion context, the Speech Clause offers a way to rebalance the scales between the conflicting interests of religious expression and establishment concerns. In the expression context, however, the Speech Clause and Press Clause share the same goals and the Speech Clause provides important breathing room to recognize for press rights and protections.

2. Political Process

In *Employment Division v. Smith*, Justice Scalia, writing for the Court, mentioned another potential fallback protection—the political process.[47] He noted that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[48] While acknowledging that reliance on the political process "will place at a relative disadvantage those religious practices that are not widely engaged in," he nonetheless stated that a society "that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[49]

The other branches of government apparently disagreed with Justice Scalia's faith in the ability of the political process to protect religious

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44. Mark W. Cordes, *Religion As Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 SW. L. REV. 235, 258 (2008) ("Religion was certainly not given any preferred status under the Free Speech Clause, but it became clear it could not be given less.")

45. *Id.*

46. Aaron H. Caplan, *Review Essay-the First Amendment's Forgotten Clauses*, 63 J. LEGAL EDUC. 532, 549 (2014)

47. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

48. *Id*.

49. *Id*.

freedoms, as evidenced by the passage of the Religious Freedom Restoration Act.[50] Senator Orrin Hatch stated upon the introduction of the bill to the Senate, "[i]t is clear to me a legislative response [to the *Smith* decision] is critical to the preservation of the full range of religious freedoms the [F]irst [A]mendment guarantees to the American people, particularly those whose religious beliefs and practices differ from the religious majority in our country."[51]

But even accepting the Court's optimism that the political process will provide some protection to religious viewpoints, turning to the political process is an even worse fit for the Press Clause. On the one hand, it is true that the press has won many legislative victories. As Professor David Anderson has noted, "the press is far from helpless when forced to make its case with the legislative and executive branches"[52] and has won a number of nonconstitutional rights and protections.[53]

There are reasons, however, to question whether political victories secured by the press during the "heyday of the Press Clause in the Supreme Court"[54] in the mid-twentieth century will continue thanks to flagging media resources and dwindling political power.[55] As Professor Lyrissa Lidsky has observed, "[m]edia that are economically and politically powerful, popular with the public, and united in pursuit of common goals may indeed be able to fight off threats to their ability to play a special role in our democracy, especially when government officials depend on the media to carry government messages to the public," but "this theory of constitutional self-help depends on a number of assumptions about the media that were largely true in the 1970s but may not be today."[56] And considering that the Supreme Court has made clear that one of the primary purposes of the Press Clause was to serve as a check on the government,[57]

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50. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.

51. 139 CONG. REC. S2824 (daily ed. Mar. 11, 1993) (statement of Sen. Hatch).

52. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 518–19 (2002).

53. *Id*. at 485.

54. *Id*. at 448.

55. Lyrissa Lidsky, The Press and Constitutional Self-Help, Then and Now, Presentation at the University of Georgia Law Review Symposium: The Press and the Constitution 50 Years after *New York Times v. Sullivan* (Nov. 6, 2013).

56. Lyrissa Lidsky, *NYT v. Sullivan Anniversary Symposium at U. of Georgia*, PRAWFSBLAWG (Nov. 3, 2013, 3:37 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/11/nyt-v-sullivan-anniversary-symposium.html.

57. *See* Leathers v. Medlock, 499 U.S. 439, 447 (1991) (stating that "[t]he press plays a unique role as a check on government abuse"); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983) ("[T]he press will often serve as an important restraint on government."); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."); Estes v. Texas, 381 U.S. 532, 539 (1965) (stating that the "free press has been a mighty catalyst" in "exposing corruption among public officers and employees").

it is inherently troubling for the press to function only at the pleasure of the branches that it is meant to be checking. Justice Scalia noted this difficultly himself in *Citizens United*, observing that the concept "that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind."[58]

3. Right of Association

Both religious and expressive rights could potentially find fallback protections in another area of First Amendment doctrine—freedom of association. While not mentioned directly in the text of the Constitution, the Supreme Court has recognized a right to associate in groups for expressive activities.[59] Yet here, again, the Court has taken a more favorable approach for blending associational rights with religious freedom than with press freedom despite the fact that using rights of association in a supporting role for press rights is a more natural fit.

While there is some uncertainty on the overlap between religion and association, the Court nonetheless has noted that "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned."[60] In some ostensibly "religion" cases, moreover, it has been observed that it is "the rights of association and conscience [that] do all of the work."[61] The Court's willingness to accept some role for rights of association in cases involving religious freedoms, however, does not come at the expense of failing to find meaning in the Religion Clauses themselves. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[62] for example, the Court rejected a right of association claim, stating instead that it could not "accept the remarkable view that the Religion Clauses have nothing to say about" a case involving religion.[63]

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58. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 390 (2010) (Scalia, J., concurring).

59. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (recognizing "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion").

60. Watson v. Jones, 80 U.S. 679, 728–29 (1871).

61. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 983 (2013).

62. 132 S. Ct. 694 (2012); *see also* Emp't Div. v. Smith, 494 U.S. 872, 882 (1990) ("And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."); Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1059–60 (2013) (who is "not persuaded that in considering the legal question of church autonomy, we must set aside the distinctive history of religious freedom, including those aspects of the history that involve churches as autonomous institutions").

63. *Hosanna-Tabor*, 132 S. Ct. at 706.

Press speakers, meanwhile, could in theory also raise freedom of association claims to challenge government regulations that infringe on newsgathering and disseminating activities. Press litigants, however, have not done so, and the courts likewise have failed to raise this discussion *sua sponte* despite the fact that "courts have not historically imposed rigid boundaries between the various doctrines and causes of action the First Amendment provides."[64]

A right of association could arise in any case where an otherwise neutral law places a burden on a group's expressive activities. Thus, in other associational rights cases, the Court has employed a balancing test that weighs the burden on the expressive activity against the government interest in its regulation.[65]

In cases involving the press, however, the Court has not engaged in the balancing test but rather "almost uniformly dismiss[es] such claims on the ground that a press entity is not entitled to a special exemption from content-neutral governmental actions."[66] The Court, therefore, has never recognized associational rights for members of the press, and instead places all the workload on the Press Clause, which it then in turn refuses to infuse with real meaning. It has done this despite potential opportunities in areas involving regulations requiring some press speakers to disseminate the speech of others or disclose the names of sources or group members.[67]

Employing the right of association as a fallback protection for the press, however, is a logical fit for press rights. It simply requires recognizing the unique constitutional functions of certain press speakers as a group. An example offered by Christopher Edgar comes from the Supreme Court case of *Pell v. Procunier*,[68] which involved a prison regulation that prohibited interviews with inmates. From the Court's point of view, "the fact that the press was not subject to harsher restrictions than the general public was wholly dispositive of the claim."[69] Yet it was a legal fiction to suggest that the anti-interview rule affected all speakers the same way. In reality, it placed a heavier burden on an expressive group consisting of reporters and inmates who wished to "collaborat[e] for the

64. Christopher R. Edgar, *The Right to Freedom of Expressive Association and the Press*, 55 STAN. L. REV. 191, 198 (2002).

65. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 626–27 (1984) (comparing the state's interest in "[a]ssuring . . . equal access" with the burdens imposed on the "male members' freedom of expressive association" and concluding that the Jaycees failed to demonstrate that the state's anti-discrimination Act "imposes any serious burdens").

66. Edgar, *supra* note 64, at 234.

67. *See id*. at 247 (raising these two examples "of cases in which governmental actions have had a deterrent effect on press entities' expressive activities" in order "to show that the press has not been afforded the same degree of associational protection as the doctrine's typical beneficiaries").

68. 417 U.S. 817 (1974).

69. Edgar, *supra* note 64, at 239.

purpose of disseminating the information obtained from the interviewee to the newspaper's audience."[70] Viewing the press more narrowly would allow the Court to recognize rights of association for the group fulfilling particular functions.

C. Functions Versus Beliefs

Recognizing press rights is a potentially easier task than interpretation of the Religion Clauses for another important reason. The Press Clause does not involve the same issues of personal, historical, and philosophical importance as does religion in our pluralistic society.[71] Religion is a belief or practice, whereas the press is best thought of as a role or a function.

Separating press speakers from nonpress speakers is a task of identifying those who are fulfilling certain functions (informing the public and checking the government).[72] Looking for the speakers who are most effectively doing these things is a task the courts are capable of undertaking. Press speakers are fulfilling a public function, and there are proxies and standards that can help the courts identify them.

Religion, however, is an entirely different beast. Religion is an inherently personal belief system. It is a matter of conscience, self-identity, and self-realization and part of the autonomous nature of personhood.[73] It has been noted that the mere act of defining "religion" might constitute an establishment of it[74] and "religion is itself especially unamenable to definition."[75] In this manner it is far more comparable to our speech rights that serve both a self-actualization purpose as well as structural functions

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70. *Id*.

71. *See* THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("A zeal for different opinions concerning religion . . . [has], in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.").

72. *See* Sonja R. West, *The Stealth Press Clause*, 48 GA L. REV. (forthcoming 2014) (contending that the "Stealth Press Clause" has revealed that the press fulfills two unique constitutional roles: (1) gathering and disseminating news to the public, and (2) providing a check on the government and the powerful).

73. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002) ("[B]y the late eighteenth century, American rationalists and evangelicals alike argued, in terms identifiably derived from John Locke, that the purpose of nonestablishment was to protect the liberty of conscience of religious dissenters from the coercive power of government.").

74. *See* Francis J. Conklin, S.J., *Conscientious Objector Provisions: A View in the Light of* Torcaso v. Watkins, 51 GEO. L.J. 252, 277 (1963) (arguing that because any attempt to define "religion" excludes "some opinions which a small minority may choose to call religion . . . any such attempt is automatically unconstitutional"); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 829–30 (1978) ("[T]oo narrow a judicial definition of religion might effect an impermissible establishment of religion.").

75. Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1563 (2005).

furthering democracy. Courts cannot and indeed should not be in the business of standing in judgment on such personal matters as one's religion.

As discussed earlier, the problem of pretextual claims is one that plagues both sets of clauses. Yet with the press, there is no concern with judging someone's religion or the sincerity of his or her belief. In cases involving the Press Clause, rather, the focus can be on function, not on personal belief. A functional inquiry could weed out a speaker claiming to be the press merely to gain access to information or to claim a testimonial or other privilege. If the speaker, for example, does not have a history of regular publication and an established audience, they are likely not functioning as the press. In addition to functional inquiries regarding whether speakers are effectively checking the government and informing the public, there are also reliable proxies to help us identify press speakers including listening to institutional cues.[76]

III. RECOGNIZING UNDERLYING VALUES

Finally, there is another important parallel and significant difference between the Religion Clauses and the Expression Clauses. This involves the primary values the pairs are trying to further and the way each clause functions to further those goals.

With each pair of clauses there is an overarching purpose, and each pair has one clause that enhances that purpose primarily as an individual right and one that enhances that purpose primarily as a societal right. The Court has elaborated somewhat on the functions of the Religion Clauses, but has done much more about the Expression Clauses.

The Religion Clauses protect a type of freedom of conscience.[77] They do this in two ways: first by granting an individual right to practice religion without undue government interference and, second, by prohibiting the government from inflicting upon both individuals and society as a whole a particular religious orthodoxy.[78]

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76. *See, e.g.*, PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 146 (2013) (stating that the press as an institution "is identifiable and long established; it is a major part of the infrastructure of public discourse; it follows its own norms, practices, and self-regulatory standards; and it is fully (if imperfectly) capable of acting autonomously"); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. (forthcoming 2014) ("Thus, by credentialing, hiring, conferring degrees upon, or in other ways recognizing individuals as the press, journalistic institutions give us important cues regarding who is serving the core purposes of the press.").

77. *But see* Micah Schwartzman, *What if Religion is Not Special*, 79 U. CHI. L. REV. 1351, 1353 (2012) (challenging the notion that religious beliefs are special as compared with secular ethical and moral beliefs.)

78. United States v. Ballard, 322 U.S. 78, 86 (1944) ("The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of

It is possible to look at the Expression Clauses as having a similar format. The Expression Clauses protect the value of positive information flow. The Speech Clause provides an individual right to express oneself without undue government interference, and the Press Clause prohibits the government from pushing upon its citizens a kind of official orthodoxy. The orthodoxy here, however, is different. It is an orthodoxy of fact.[79] The Press Clause gives citizens the freedom, via a structural check, to challenge a government message that claims to be a message of fact.[80]

In addition to the value of autonomous individual speech, the Speech Clause can also further the value of checking orthodoxy of fact. But there are reasons to think that it does so less effectively than the Press Clause could, because furthering this value requires not just protecting speech but protecting the act of gathering and analyzing the necessary information.

Furthering this role for the Press Clause, however, requires providing rights and protections for certain speakers in situations where the Speech Clause does not fill that role. It is infeasible to give these tools to all speakers for reasons already mentioned. But it is also a failure to the value of protecting an informed citizenry to deny them to all speakers.

The Press Clause could and should provide an additional weapon in battling the official orthodoxy of government "truth" (as well as, perhaps, the "truth" purported by powerful private persons and entities) much like the Religion Clauses resist the establishment of government religious "truth." It is possible for us to identify situations that are unusually helpful to the information flow situation in a way that is not too harmful to the competing value of having uniform government regulation. Drawing this line cannot be done perfectly, of course, but it can be done effectively enough.

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worship' but also 'safeguards the free exercise of the chosen form of religion.'") (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

79. I owe thanks and credit to Christian Turner for suggesting this framework and much of the phrasing used to discuss it.

80. In the years following the September 11th terrorist attacks, the press acted as an important check on the government by reporting on the Bush Administration's policy on torture of detainees. For example, in June of 2004, the *New York Times* released a story describing leaked memorandums that had been prepared for Defense Secretary Donald Rumsfeld stating that Executive Branch officials could be immune from domestic and international prohibitions against torture. Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES (June 8, 2004), http://www.nytimes.com/2004/06/08/politics/08ABUS.html. In the most famous example of the press checking the government, Bob Woodward and Carl Bernstein of the *Washington Post* uncovered President Nixon's involvement in the Watergate scandal, which ultimately led to his resignation. For a complete description of the series of events leading up to President Nixon's resignation, see *The Watergate Story*, WASH. POST, http://www.washingtonpost.com/watergate/ (last visited May 6, 2014).

CONCLUSION

An abdication of the Press Clause reflects the most basic of analytical errors: It treats the text of the Press Clause as redundant and ignores the specialized functions that the Framers meant for the Press Clause to play.[81] Failing to give the Press Clause constitutional recognition by declaring it too difficult to interpret or by dismissing it as "mere surplusage"[82] is utterly at odds with our constitutional traditions. The Religion Clauses provide an example on how to give the text of the Press Clause true meaning.

In interpreting the Religion Clauses, the Supreme Court has taken a different attitude than it has with the Expression Clauses. Most notably, it did not find it necessary to deny one of the two clauses its potential power. To be sure, the path it forged is controversial. But controversy is hardly unique to the Court's constitutional interpretation. What is important is that the Court in dealing with the clauses has found it possible, indeed necessary, to view each interdependent provision as having important work to do. And so it should be with the Speech and Press Clauses.

81. West, *supra* note 4, at 1033.

82. Marbury v. Madison, 5 U.S. 137, 174 (1803).